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857491—49

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 295

PHILLIP HIMMELFARB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 1646–1707) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals affirming the conviction of petitioner was entered June 3, 1949 (R. 1708), and an order denying petitioner's petition for a rehearing was entered August 1, 1949 (R. 1710). A petition for a writ of certiorari was filed August 29, 1949. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Was the evidence sufficient to support the conviction?

2. Was the testimony of petitioner's accountant privileged?

3. Did the trial court erroneously admit opinion testimony of a Government witness?

4. Did the Court of Appeals erroneously disregard a stipulation observed during trial between the trial court and counsel relating to the separate application of evidence to the petitioner?

5. Was the argument for the Government, to which no timely objection was made, prejudicial?

6. Was it error to admit in evidence bank records of the petitioner and a net worth statement submitted by him?

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other

penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

STATEMENT

The facts are set forth in the Government's brief in the companion case of *Ormont* v. *United States,* No. 296, filed simultaneously herewith. Such additional facts as are pertinent to the issues raised by petitioner Himmelfarb will be briefly stated in the Argument.

ARGUMENT

1. The petitioner contends that the evidence was insufficient to support his conviction, asserting that it is not shown what portion of the $35,694.42 admittedly received by him between May 1, 1944 and April 30, 1945 was received in the calendar year 1944. (Pet. 13; Br. 43–45.) Since the accumulation of the total sum commenced early in 1944 and went on during eight months of that year (Govt. Ex. 50–C, 50–D), the inference that some portion of the total was received in 1944 is inescapable. *Cave* v. *United States,* 159 F. 2d 464, 468 (C. A. 8), certiorari denied, 331 U. S. 847; *Cooper* v. *United States,* 9 F. 2d 216, 224 (C. A. 8). The record contains much other competent evidence, which was reviewed by the court below

5. Like Ormont, this petitioner makes complaint of allegedly improper remarks by counsel for the Government. (Pet. 8, 9; Br. 31.) The court below read the argument in its entirety and found nothing upon which to base a reversal. (R. 1703–1704.) The petitioner made no objection at the time to the remarks of which he now complains. There is plainly no reason for this Court to review the question.

6. The petitioner complains finally of the admission of various bank records and a net worth statement. (Br. 38, 41.) The court below dealt adequately with these objections (R. 1700–1702), and it is plain that they present nothing calling for review by this Court.

CONCLUSION

The decision of the court below rests on the particular facts of the case, is plainly correct, and presents no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER, 1949.

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